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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)	MM Docket No. 92-266

COMMENTS

OF

LIFETIME TELEVISION

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SUMMARY

The 1992 Cable Act has hampered Lifetime's ability to retain and expand its universe of subscribers as cable operators are reluctant to add new services or even renew existing contracts in the face of uncertain rate regulation. The statute also creates a competitive imbalance in the program distribution marketplace that will undeniably hamper Lifetime's ability to compete successfully for advertiser support by giving favored treatment to broadcasters in terms of cable carriage, channel positioning and tiering.

Lifetime generates approximately 70% of its revenues from advertising. Lifetime's audience niche attracts a select universe of advertisers who depend on Lifetime's ability to deliver the "critical mass" of targeted viewers from which even a small rating will produce an acceptable audience level. The loss of any advertiser support can be harmful since Lifetime's audience focus limits its spectrum of potential advertisers. Furthermore, reduced advertising revenues would limit Lifetime's ability to invest in new programming.

The FCC's rate formulas for both basic service tier and non-basic service tier services must provide cable operators with reasonable incentives to distribute cable networks on service levels with the most viewership. A price/value approach to rate regulation would allow different rates to be charged by different operators depending on the number of services offered on a particular service tier and could be implemented by establishing a reasonable per channel rate for the services offered. Rate formulas which discriminate against cable networks by imposing a ceiling either on the number of services which can be offered or the price that can be charged may force cable operators to move cable networks to less widely viewed mini-tiers. It may also cause them to offer such networks on an <u>a la carte</u> basis, or

discontinue carriage of such networks altogether. This would undermine the viability of those services such as Lifetime that rely on reaching the largest possible targeted audience to maintain advertising support.

The FCC must establish formulas allowing for increased programming costs to be passed through to subscribers without local approval. Without a pass-through mechanism, cable operators will be inclined to remove cable networks from the most widely viewed tiers or offer such networks on an unregulated a la carte basis. It is especially important that a cost pass-through mechanism is established for the statute's newly authorized broadcast retransmission consent fees. Because cable operators must carry broadcast stations on the basic service tier, the absence of a pass-through mechanism may force operators to reduce costs by retiering cable networks currently carried on the basic tier and/or by substituting lower cost, lesser quality programming.

The FCC must not penalize cable operators who sell local advertising by requiring advertising revenues to subsidize a lower rate for the basic service tier and non-basic service tier services. Such a requirement would encourage tiering and would remove the very incentive to promote Lifetime that local advertising opportunities are designed to provide.

Finally, the FCC must establish a high presumption of reasonableness for cable programming service rates or face the possibility that a flood of groundless rate complaints will discourage cable operators from making the financial investment to support the development of new services and the continued improvement of existing services.

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COMMENTS

Lifetime Television ("Lifetime") hereby submits these comments for consideration by the Commission in its rulemaking proceeding to implement the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] Lifetime is a 24-hour per day satellite-delivered cable network which is operated by Hearst/ABC-Viacom Entertainment Services.[2] Lifetime offers original and previously produced television programs of particular interest to women six days per week (Monday through Saturday). On Sunday, Lifetime

[1]Pub. L. 102-385, 106 Stat. 1460 (1992). Notice of Proposed Rulemaking in MM Docket No. 92-266, ___ FCC Rcd ___ (adopted December 10, 1992) ("NPRM").

[2]Hearst/ABC-Viacom Entertainment Services is a joint venture operating as a partnership under the laws of the State of New York and is owned by The Hearst Corporation, Capital Cities/ABC Video Enterprises, Inc., a wholly owned subsidiary of Capital Cities/ABC, Inc. and Lifetime Holdings, Inc., a wholly owned subsidiary of Viacom International Inc.

offers Lifetime Medical Television, the world's foremost provider of television programs for medical professionals.

Lifetime Television has distinguished itself in its commitment to telecast targeted, meritorious programs that perform a valuable service for its viewers. Among this array of acclaimed programs are two series hosted by the world's leading parenting and pediatric authorities, "What Every Baby Knows" (with T. Berry Brazelton, M.D.) and "Your Baby and Child" with Penelope Leach. The programs, both of which have received cable television's highest honors, provide essential information to parents at a time when child rearing is more complex than ever before.

Lifetime's phenomenal audience growth is testament to the need for a parenting series and other valuable programs Lifetime offers. Since its inception in February 1984, Lifetime's reach has grown from 17 million to approximately 57 million homes.[3] During this same period, Lifetime's total programming investment has grown almost tenfold, with much of this investment going towards the development of original programming. Lifetime distinguishes itself from its many competitors with its relatively high percentage of original programming, i.e., programs either first available on Lifetime or available on no other program service in the United States. This favorable mix

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[3]As of January, 1993, according to A.C. Nielsen Company.

of original to acquired product is of great value to Lifetime in its efforts to further expand its distribution.

I. Introduction.

Since the enactment into law of the 1992 Cable Act, Lifetime's ongoing effort to retain and expand its universe of subscribers has met with resistance from cable operators who are reluctant to add new services or merely renew existing contracts while facing the prospect of uncertain rate regulation. This has had a chilling effect on cable operator programming decisions. In addition, the statute threatens to create a competitive imbalance in the program distribution marketplace that will undeniably hamper Lifetime's ability to compete successfully for advertiser support and the acquisition of programming by giving favored treatment to competing broadcast networks in terms of cable carriage, channel positioning and tiering.[4] It also allows broadcast stations, for the first time, to negotiate payment from cable operators for the right to retransmit their signals.[5] Such advantages are given to broadcasters not because of any

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[4] See, 47 U.S.C. §§534(a) and 535(a) (mandatory carriage of broadcast stations); 534(b)(6) and 535(g)(5) (channel positioning rights); 543(b)(7) (carriage of broadcast signals on the basic service tier). While it is true that satellite-delivered superstations such as WTBS (Atlanta, GA), WGN-TV (Chicago, IL) and WWOR-TV (Secaucus, NJ) are not given carriage and channel positioning rights by the 1992 Cable Act, the Copyright Act of 1976 provides substantial monetary incentives for cable operators to carry any such stations on their basic service tier. See 17 U.S.C. §111 et seq.

[5] See 47 U.S.C. §325(b).

inherently more desirable or worthy programming, but simply because of their status as broadcasters.[6]

Lifetime generates approximately 70% of its total revenues from ad sales. This revenue stream has allowed Lifetime to improve the quality of its programming while keeping affiliate fee increases well below the level that would otherwise be required. Because of Lifetime's audience niche, its primary goal must be to maintain and expand its distribution to continue to attract those advertisers who are interested in reaching Lifetime's target audiences.

Unlike broadcast networks, whose range of advertisers is broader because network programming is designed for mass appeal, Lifetime's advertising revenues are derived from a more select universe of advertisers who depend on Lifetime's ability to deliver the "critical mass" of targeted viewers. In this scenario, even a small rating produces an acceptable audience level for the advertiser. For example, manufacturers of baby products may well prefer to advertise on Lifetime's parenting programming segments than to purchase advertising time on a typical broadcast network schedule. Although the total number of households reached by Lifetime is much smaller, advertisers know

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[6]Broadcast networks already enjoy significant competitive advantages over cable programming networks such as Lifetime in attracting advertising revenue based upon their ability, via government awarded spectrum, to reach virtually the entire universe of television households at little cost. In contrast, the potential viewer base of cable programming networks is more limited than that of the broadcast networks.

that their ads are reaching enough viewers of the precise type they seek to target. However, if Lifetime's audience is reduced in any appreciable way below that level, Lifetime risks the loss of support from its current advertisers. The loss of any advertising support can be harmful, since Lifetime's audience focus limits its spectrum of potential advertisers. Furthermore, reduced advertising revenues would limit Lifetime's ability to invest in new programming.

The economics of broadcast television do not sustain the opportunity cost involved in telecasting to a small audience. Until cable television came to the fore, the concept of targeted programming was unworkable. Over the last decade, cable television's reach has expanded to a degree that currently allows it to provide such needed programming within the framework of an advertiser's expected level of return. The ability of Lifetime to deliver its "critical mass" of homes is essential to keep the concept of targeted, meritorious programming alive and to keep the public well served.

To this end, the rate regulation provisions of the 1992 Cable Act should not be implemented in a way which exacerbates an already inequitable situation by establishing rate standards for cable operators that provide little choice but to: (1) remove cable networks from a widely viewed service tier and offer them on a less attractive mini-tier or on an *a la carte* basis; or (2) drop a more costly high quality cable network and substitute a no-cost service.

II. Distribution Incentives.

The FCC's rate formulas for both the basic service tier and non-basic service tier services must provide cable operators with reasonable incentives to distribute cable programming services on service levels with the most viewership. In the overwhelming preponderance of cases, Lifetime is carried either on the cable system's initial basic level of service or, more commonly, on its next most widely viewed tier. Any rate formula adopted by the FCC must not provide an incentive for operators to retier advertiser supported services to less widely viewed levels of service, particularly those services that, like Lifetime, rely on targeted audiences. Lifetime's ability to attract advertising revenues, to produce original programming and to compete in the highly competitive programming acquisition marketplace will be severely impacted, even threatening its continued viability. The diversity of programming which the 1992 Cable Act seeks to foster will not exist where there are no financial incentives for new programming investments.[7]

The statute does not place any restrictions on the number of services which can be offered on a cable operator's basic or on widely-distributed non-basic tiers. Indeed, Congress expressly provided cable operators with discretion to "add additional video programming signals or services to the basic service tier."[8] The

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[7] 1992 Cable Act at Section 2(b)(1)-(3).

[8] 47 U.S.C. §543(b)(7)(B).

only requirement with respect to the provision of such additional services was that they be "provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection."[9] The Commission's rate formulas must not restrict the ability of cable operators to add new services to, or retain existing services on, their most widely viewed tiers. Lifetime's ability to compete as a viable national advertising medium is directly related to Lifetime's audience reach as a network. If rates are regulated so as to provide incentives, direct or indirect, for cable operators to place services such as Lifetime on a remote tier or to offer it only on an a la carte basis, shows like "What Every Baby Knows, Etc." will not receive sufficient advertising support and, therefore, may not be available.

There are significant differences in the manner in which basic and non-basic rates are determined to be appropriate. But in both instances, whether a rate violates the statutory standard cannot be determined apart from the level of service provided. For example, while a price of $25,000 may be considered an unreasonable purchase price for a Ford Escort, it would be considered more than reasonable if applied to a new Lincoln or Cadillac. Likewise, the determination of what constitutes a reasonable rate must differ in cases where one cable operator offers a limited number of services and another operator offers

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[9] Id.

the full panoply of satellite-delivered cable networks which have, in part, been fostered by the absence of rate regulation. Accordingly, the FCC must implement rate regulation in a fashion that recognizes a price/value relationship in determining a particular tier rate and which does not create regulatory disincentives for cable operators to offer additional services as part of basic service or the next most widely viewed tier.

A price/value approach would require the Commission to design rate formulas that take into account the number of services offered on a particular tier. These rate formulas should be flexible enough to allow different rates to be charged by different operators depending on the number of services. One way to implement this approach would be to establish a fair and reasonable per channel rate for the number of services which an operator chooses to offer. If the FCC develops rate formulas that discriminate against the cable networks either by limiting the number of cable networks that can be offered on widely viewed tiers or by imposing an overall price ceiling without respect to the number of discretionary satellite networks offered, cable operators could be forced to move such cable networks to mini-tiers or to offer them on an a la carte basis in order to reduce their costs. Such a result would undermine the viability of services, such as Lifetime, that rely on reaching the largest possible targeted audience to maintain the support of their advertisers.

The FCC's rate guidelines should also allow cable operators, whose rates exceed the level of reasonableness with respect to a particular tier, to improve service by adding additional satellite cable networks or other services to that tier as an alternative to reducing or restructuring its rates. The Commission has long recognized that cable operators must be given maximum flexibility to experiment with different approaches to market their services in a manner that will most efficiently distribute video programming.[10] A regulatory approach which would give cable operators the option to improve their service in lieu of reducing rates is entirely consistent both with a price/value approach to rate regulation and with Congress' goal of fostering diversity.

III. Cost Recovery Incentives.

In developing its rate formulas, the FCC must consider programming costs as a special class of expense. The costs of developing high quality, targeted programming have been subject to increase more than any other costs associated with cable distribution, including equipment, labor, or government imposed costs. In fact, the Commission itself has recognized that programming costs are one of the direct costs of providing cable service and allowing cable operators to pass these costs through

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[10] Community Cable TV, Inc., 95 FCC 2d 1204 (1983), recon. denied, 98 FCC 2d 1180 (1984).

to subscribers might reduce the cable operator's incentive to remove highly valued programming from widely viewed tiers.[11]

This view is supported by the legislative history of the 1992 Cable Act which states:

> The Committee intends that the formula established by the Commission allow cable operators a full recovery of the costs identified in that formula as well as a reasonable profit (to be defined by the Commission) on the provision of the basic service tier. Further, the Committee recognizes that many of the costs involved in the provision of basic service are subject to change. Accordingly, the Commission may provide that such formula be sufficiently flexible to take into account changes in such costs so that the maximum price for the basic service tier may be adjusted, upward or downward, by the operator as those costs change.
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> * * *
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> It is the Committee's expectation that the Commission will recognize that changes in the direct costs of programming are likely to occur during a rate cycle. This subsection is intended to permit the Commission to develop a system of "pass throughs" or other appropriate mechanisms (bearing in mind the need to protect consumers' interests) to permit cable programmers to be fairly compensated for the service they provide to cable subscribers and to encourage cable systems to carry such services in the basic tier.[12]

The language clearly demonstrates that Congress did not intend to discriminate against cable programming networks by requiring

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[11] NPRM at ¶ 54.

[12] H.R. Rep. No. 628, 102d Cong., 2d Sess. 82 (1992) ("House Report").

cable operators to offer a stripped-down basic service tier, or to offer cable services previously available on popular non-basic service tiers on an unregulated a la carte basis.

Retransmission consent fees, which broadcasters will be allowed to demand from cable operators for the first time in history, will undoubtedly increase the cost of providing cable services.[13] It is especially critical that the FCC's basic rate formula allows cable operators to automatically pass through broadcast transmission consent fees without the need for local approval. The statute again does not treat broadcasters and satellite cable networks impartially. The law requires broadcast signals to be carried on basic and, consequently, does not permit cable operators to move stations demanding retransmission consent payments to a less stringently regulated non-basic service tier. Thus, if cable operators are unable to increase rates in order to recover these newly imposed costs of providing rate regulated basic service, they will be forced to reduce the cost of providing basic service in other ways in order to operate profitably. One disastrous alternative would be for cable operators to reduce their costs of providing basic service by retiering or altogether discontinuing carriage of cable networks currently offered on the basic service tier and substituting lower cost, lesser quality programming services. Satellite cable

[13] See 47 U.S.C. §325(b).

networks should not have to pay the price of any basic cost increases imposed by competing broadcast networks.

The Commission should also consider allowing the benchmark rates for both basic service tier and non-basic service tier services to be periodically increased in a fashion that accounts for the higher than annual CPI increases that have been historically associated with cable programming production and distribution. The inflation index associated with entertainment services should be one component used to arrive at a realistic, annual inflation index for cable services rates.

IV. Advertising Incentives

The 1992 Cable Act directs the FCC to consider cable operators' advertising revenues in establishing its rate formulas for both basic service tier and non-basic service tier services.[14] Lifetime urges the FCC not to adopt rate formulas that penalize cable operators who sell local advertising by requiring them to charge a lower rate for such services. This would also negate the incentives that cable networks seek to create by making local advertising opportunities available.

Initially, the FCC's rate formulas should not require revenue obtained by cable operators from the sale of local advertising spots provided on cable networks to subsidize a lower rate for basic service tier and non-basic service tier services. If carriage of cable networks on widely viewed tiers is

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[14] See, 47 U.S.C. §§543(b)(2)(C)(iv); 543(c)(2)(F).

discouraged because local advertising revenues will be offset against permissible rates, satellite delivered services will lose their ability to continue to provide to the cable operator an established economic incentive to increase their distribution. Local advertising opportunities are an important part of promoting services, such as Lifetime, that make local advertising spots available to their affiliates. Such opportunities give affiliates a direct stake in the success of Lifetime because as Lifetime increases its audience ratings, the operator can increase its advertising revenue. If cable operators are penalized and forced to offset advertising revenues against their allowable rates, the incentive to promote Lifetime that local advertising opportunities are designed for is negated.

Finally, given the numerous advantages (including a larger universe and mass appeal) which broadcast networks already possess in competing for advertiser support, it would be unfair for the FCC to adopt rate formulas which further restrict the ability of cable networks to compete in this area. Given the fact that local ad spots on satellite cable networks allow for competition between cable operators and television broadcasters for those desiring to advertise locally, such competition should not be discouraged by an FCC formula which requires ad revenues derived from the sale of local availability on cable networks to subsidize lower subscriber rates, especially those rates charged for tiers containing mandatory broadcast programming.

V. **Cable Programming Service Rates Are Entitled to a High Presumption of Reasonableness.**

Subjecting non-basic services to extensive rate regulation will force operators to either drop existing services or to refuse to add new services as a means of reducing the cable operator's own costs of providing service. Because the new law allows even a single subscriber or franchising authority to file a complaint challenging the existing non-basic service tier rate or any future rate increase for non-basic service tier services, all cable operators are at risk of having their present and future non-basic rates challenged regardless of how favorable the price/value relationship is. The Commission must quickly serve notice to the public that a cable operator's non-basic service tier rates will be given a high presumption of reasonableness and that such rates will be found unreasonable in only the small minority of situations where such rates can be considered abusive. If the Commission, through delay, inadvertence or failure to follow Congressional intent does not establish a mechanism to discourage the filing of frivolous and groundless rate complaints and to quickly dispose of such complaints, cable operators will be reluctant to make the financial investment to support the development of new programming services and the continued improvement of existing services.

A presumption of reasonableness is entirely consistent with the regulatory scheme for non-basic services which limits the FCC's regulatory authority to establishing "criteria. . . for identifying, in individual cases, rates for cable programming services that are unreasonable."[15] That rates for non-basic tier services were not subject to the same pervasive regulatory structure as basic service is also evident from the legislative history of the 1992 Cable Act. The House Report states that:

> The Committee recognizes that since cable rates were deregulated in 1986, there has been an increase in the quality and diversity of cable programming. While most operators have been responsible about rate increases in this deregulated environment, a minority of cable operators have abused their deregulated status and have unreasonably raised subscribers rates.[16]

The foregoing language clearly demonstrates that Congress intended non-basic tier rate regulation to be used sparingly as a means to correct isolated instances of abuse. The FCC must be careful not to regulate non-basic tier rates in a heavy-handed manner that would reduce, rather than foster, program diversity.

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[15]47 U.S.C. §543(c)(1)(A) (emphasis supplied).

[16]House Report at p. 86.

WHEREFORE, based upon the foregoing, Lifetime requests the Commission to refrain from adopting regulations that will further exacerbate the distinctly unlevel playing field which the 1992 Cable Act creates with respect to the ability of cable networks to compete with broadcast networks and superstations for advertising support and adopt a price/value approach that will continue to encourage program diversity.

Respectfully submitted,

HEARST/ABC-VIACOM ENTERTAINMENT SERVICES, doing business as LIFETIME TELEVISION

By: [signature]

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